No. 06-157

In the Supreme Court of the United States

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL., PETITIONERS

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The court of appeals' decision in this case has created a new and broad Establishment Clause exception to Article III's case-or-controversy requirement. The court expanded *Flast* v. *Cohen*, 392 U.S. 83 (1968), to authorize taxpayer standing to challenge on Establishment Clause grounds anything an Executive Branch official does that is "funded by money derived from appropriations," Pet. App. 11a—which, of course, covers everything the Executive Branch does. Respondents devote the bulk of their brief in opposition to arguing that tax-

[1] Pursuant to Supreme Court Rule 35(3), Jay F. Hein has been substituted for his predecessor, Dennis Grace, who had been the Acting Director of the White House Office of Faith-Based and Community Initiatives.

payer standing should be every bit as broad as the court of appeals authorized. The only question at this juncture, however, is whether this Court should review the court of appeals' unprecedented expansion of taxpayer standing because it conflicts with this Court's decisions and their "promise" of "narrow application" of the doctrine, *DaimlerChrysler Corp.* v. *Cuno*, 126 S. Ct. 1854, 1865 (2006), as well as with the decisions of other courts of appeals. As a majority of the Seventh Circuit's judges agreed, Pet. App. 59a-66a, the confusion in the law and profound implications of the court of appeals' decision warrant this Court's review.

1. The court of appeals' decision departs significantly from this Court's taxpayer-standing decisions. While embracing (Br. in Opp. 4-9) the court of appeals' broad expansion of taxpayer standing, respondents nevertheless insist there is no conflict with this Court's precedent (*id.* at 9). But taxpayer standing to bring Establishment Clause claims cannot simultaneously be as broad as the court of appeals authorized and as narrow as this Court's cases command. See *DaimlerChrysler*, 126 S. Ct. at 1865 (noting "its narrow application in our precedent"); *Bowen* v. *Kendrick*, 487 U.S. 589, 618 (1988) ("[W]e have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing."); *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 481 (1982) (discussing the "rigor with which the *Flast* exception * * * ought to be applied").

To put the conflict with this Court's precedent more starkly, this Court has carefully cabined the *Flast* exception for taxpayer standing in Establishment Clause cases by requiring that the taxpayer satisfy two criteria. First, "only" challenges to "exercises of congressional

power under the taxing and spending clause of Art. I, § 8, of the Constitution" are permitted. *Flast*, 392 U.S. at 102. Accordingly, all the cases in which this Court has recognized taxpayer standing to raise Establishment Clause challenges involve the disbursement of congressionally authorized funds to religiously affiliated entities. Pet. 16-20. Second, the challenge must be on Establishment Clause grounds, as opposed to some other alleged basis of unconstitutionality. *Flast*, 392 U.S. at 102; see *DaimlerChrysler*, 126 S. Ct. at 1864.

The court of appeals' decision has eliminated that first prong. The court of appeals recognized taxpayer standing to challenge an exercise of purely executive—not congressional—power. Respondents do not challenge the constitutionality of any law passed by Congress or the disbursement of funds earmarked by Congress for particular uses. Nor do they question Congress's power to pass appropriations legislation funding the salaries and activities of White House and agency personnel. Respondents, in fact, have been "unable to identify [any] appropriations" from Congress that they challenge. Pet. App. 10a. Instead, they challenge the decisions of Executive Branch officials to meet with faith-based and secular community organizations and to discuss the role such groups can play in community programs. Pet. App. 10a; see *id.* at 73a, 77a. Recognizing taxpayer standing to bring such a challenge not only fundamentally deviates from *Flast*, but also directly conflicts with this Court's decision in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), which *Flast* distinguished in discussing the first prong of its test. See *Flast*, 392 U.S. at 102; see also Pet. 17 & n.9. Respondents, by contrast, do not even attempt to distinguish this Court's decision in *Doremus*.

To be sure, the court of appeals considered it important (Pet. App. 11a) that those Executive Branch activities were "funded by money derived from appropriations." But that reduces the first prong of *Flast* to a pleading ritual. All Executive Branch activity is undertaken by officials whose salaries are "funded by money derived from appropriations," and who employ government resources (whether papers, pens, or electricity in their office space) that are "funded by money derived from appropriations." Indeed, the court of appeals acknowledged "the fact that almost all executive branch activity is funded by appropriations." *Id.* at 12a.

Respondents cogently capture (Br. in Opp. 7) the jurisprudential transformation wrought by the court of appeals' decision, explaining that taxpayers now need allege only "a claim that tax dollars are being misused" by Executive Branch officials. But those are not "exercises of *congressional* power under the taxing and spending clause of Art. I, § 8, of the Constitution," *Flast*, 392 U.S. at 102 (emphasis added), and this Court has made clear that "the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing," *Valley Forge*, 454 U.S. at 477.

In fact, if the court of appeals' decision were the law, as respondents suppose, this Court's decision in *Valley Forge*—which denied taxpayer standing for a challenge to the Executive Branch's transfer of federal property to a religious entity, 454 U.S. at 479—would have to be overruled. Respondents attempt (Br. in Opp. 9) to distinguish *Valley Forge* on the ground that it "involved an agency decision to transfer a parcel of federal property," rather than a challenge to congressional legislation. But respondents make no effort to explain how the use of appropriated funds (in terms of salaries and resources)

to deal with, process, and transfer property to a religious entity is different from the use of appropriated funds to meet and talk with religious entities, which is the sole predicate for taxpayer standing in this case. The difference that this Court saw between *Valley Forge* and *Flast* was of constitutional magnitude. *Valley Forge*, 454 U.S. at 474-481. The court of appeals has reduced it to a pleading error.

Recognizing the implications of its decision, the court of appeals excepted those cases where "the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause would be zero." Pet. App. 12a. Whatever the value of such an "incremental cost" test—and there is little in constitutional history, law, or logic to commend it—that is not this Court's test. The court of appeals' decision to jettison the first prong of the *Flast* test in favor of a new jurisprudence of *non-de minimis* incremental cost is in such conflict with this Court's decisions and raises such important Article III and separation of powers concerns as to warrant this Court's review.[2]

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[2] In the wake of its decision in this case, the Seventh Circuit has gone so far as to dispense not only with the first prong of the *Flast* test, but also with the requirement of a suit against a governmental entity that is bound by the Establishment Clause. See *Laskowski* v. *Spellings*, 443 F.3d 930 (7th Cir.) (extending taxpayer standing to suits for recoupment against private grantees of federal funds), amended on reh'g, 456 F.3d 702 (2006), petition for cert. pending, No. 06-582 (filed Oct. 24, 2006). While that case underscores the need for this Court to provide guidance on the proper scope of taxpayer standing in Establishment Clause cases, the case at hand presents an antecedent breach of *Flast*'s limitations and reflects a general breakdown in standing jurisprudence that could recur any time that one of the more than 11 million taxpayers within the Seventh Circuit takes exception on Establishment Clause grounds to Executive Branch action occurring anywhere in the United

2. Respondents argue (Br. in Opp. 5-7) that *Bowen* eliminated the requirement that the taxpayer challenge a congressional exercise of the taxing and spending power and expanded taxpayer standing to any Establishment Clause "claim that tax dollars are being misused." Br. in Opp. 7. This Court said the opposite in *Bowen*, explaining that standing to challenge "administratively made grants" fits *Flast*'s mold because the authorizing statute "is at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers, and appellees' claims call into question how the funds authorized by Congress are being disbursed pursuant to the [Act]'s statutory mandate." 487 U.S. at 619-620. Under those circumstances, the claim that "funds are being used improperly by individual grantees is [no] less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary [of Health, Education and Welfare]." *Id.* at 619. What was key to standing, the Court concluded, was that the taxpayers' allegations "call[ed] into question how * * * funds authorized by Congress are being disbursed pursuant to * * * statutory mandate." *Id.* at 620. In short, *Bowen* reaffirmed, rather than dispensed with, the requirement that taxpayers challenge *Congress's* exercise of its taxing and spending power.

States or perhaps even abroad. The question presented in *Laskowski* involves the distinct circumstance of remedying Establishment Clause violations when the underlying claim has been mooted and no action remains against the government. See Pet. at i, 9-10, *University of Notre Dame* v. *Laskowski*, No. 06-582 (filed Oct. 24, 2006). Accordingly, this Court should grant certiorari in this case without awaiting disposition of the *Laskowski* petition, which might not be positioned for review this Term.

The distinction between an agency's role as a conduit for congressionally directed disbursements and an agency's conduct of its routine internal operations is important, because the congressionally directed disbursement of funds outside the government to a religious entity or for religious ends is critical to reconciling taxpayer standing with Article III's case-or-controversy requirement. *Flast* found an Article III injury rooted in the historic constitutional concern—unique to the Establishment Clause—that a taxpayer not be "force[d] * * * to contribute three pence only of his property for the support of any one establishment," *Flast*, 392 U.S. at 103 (citation omitted). Given the unique constitutional and historical pedigree of that concern, the Court held that an individual's claim that "his tax money is being extracted and spent in violation of [that] specific constitutional protection[] against such abuses of legislative power" could satisfy the individualized-injury requirement for Article III standing. *Id.* at 106; see *DaimlerChrysler*, 126 S. Ct. at 1865 (under *Flast*, "the 'injury' [is] * * * the very 'extract[ion] and spen[ding] of 'tax money' in aid of religion") (quoting *Flast*, 392 U.S. at 106).

When the court of appeals in this case abandoned that nexus to the disbursement of funds—the extraction and spending of funds to aid religious groups—it eliminated the existence of a cognizable Article III injury in its taxpayer standing cases. While the Establishment Clause recognizes a distinct constitutional injury to taxpayers in having their "three pence" used to pay a minister's salary, *Flast*, 392 U.S. at 103 (citing Madison's "famous Memorial and Remonstrance Against Religious Assessments"), there is no such constitutional tradition of a cognizable individualized injury arising from the

payment of government officials' salaries when they make speeches or attend meetings, even with religious content. See Pet. 20 & n.10. To the contrary, from President Washington to President Lincoln to the present day, Presidents and other Executive Branch officials have made speeches invoking religion and have met with religious leaders without constitutional incident. See Pet. 20-21 & n.10.

The court of appeals thus transformed *Flast* from an exceptional determination that Article III is satisfied when taxpayers challenge Congress's use of its taxing and spending power to disburse funds to outside groups into a wholesale exception to Article III. That fundamental uprooting of this Court's taxpayer-standing jurisprudence "has serious implications for judicial governance," Pet. App. 63a (Ripple, Manion, Kanne & Sykes, JJ., dissenting from the denial of rehearing en banc), and "put[s] the judicial and the political branches of the federal government," as well as state governments," at odds." Pet. App. 60a (Easterbrook, J., concurring in the denial of rehearing en banc); see Ind. Amicus Br. at 8-10.

3. As noted by the four Seventh Circuit judges who dissented from the denial of rehearing en banc, the court of appeals' decision also creates an inter-circuit conflict that merits this Court's resolution. Pet. App. 24a-26a, 65a-66a. Respondents' argument confirms the conflict.

First, respondents have no answer to the argument that the court of appeals' ruling conflicts with the D.C. Circuit's decision in *American Jewish Congress* v. *Vance*, 575 F.2d 939 (1978), which denied taxpayer standing to challenge the actions not of Congress, but of "executive officials" who allegedly "expended governmental funds to effectuate cooperative programs" with

third parties in a manner that violated the First Amendment. *Id.* at 944.[3]

Respondents essentially concede the conflict with the Second Circuit, admitting that its decision in *In re United States Catholic Conference*, 885 F.2d 1020 (1989), cert. denied, 495 U.S. 918 (1990), "comes closest to supporting" the government's view. Br. in Opp. 10. Respondents argue, however, that *Catholic Conference* "no longer reflects the position" of the Second Circuit. *Ibid*. That is wrong. The court's taxpayer-standing analysis in that decision has never been overruled or even questioned in that circuit. Quite the opposite, the Second Circuit explained in *Lamont* v. *Woods*, 948 F.2d 825 (1991), that *Catholic Conference* continues to control when plaintiffs challenge purely executive action and "d[o] not impugn Congress's exercise of its taxing and spending power." *Id*. at 831.[4] Far from "limit[ing] the applicability" of *Catholic Conference* (Br. in Opp. 10),

[3] Respondents stress (Br. in Opp. 9-10) that *Public Citizen, Inc.* v. *Simon*, 539 F.2d 211 (D.C. Cir. 1976), did not involve an Establishment Clause challenge. But as to the first prong of *Flast*, the D.C. Circuit held in *Simon* that "mere executive activity that entails some expenditures" does not suffice for taxpayer standing. *Id*. at 218-219. That directly conflicts with the court of appeals' decision here. And, in any event, there is clearly a split between the Seventh Circuit's decision and the law of the D.C. Circuit, whether or not the latter is embodied in one decision or two.

[4] *Lamont* involved a challenge to a federal statute that authorized disbursements "to individuals or organizations in the United States for the benefit of specific foreign schools" on the ground that some of the schools were affiliated with sectarian sponsors. 948 F.2d at 828. As such, that suit against the federal agency that disbursed congressional funds fit the traditional *Flast* model of taxpayer standing because "Congress authorized the disbursements that are alleged to violate the Establishment Clause: [the agency] simply carried out Congress's scheme pursuant to its statutory mandate." *Id*. at 830.

Lamont thus reaffirmed that when the challenge is to Executive Branch activity, rather than to Congress's use of its taxing and spending power to disburse funds, taxpayer standing will be denied. 948 F.2d at 830-831; see *id.* at 831 (*Catholic Conference* governs when "[t]here [i]s no claim * * * that Congress had authorized the challenged agency action"). That is the opposite of the Seventh Circuit's decision here.[5]

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

NOVEMBER 2006

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[5] Respondents' reliance (Br. in Opp. 8-9) on *Minnesota Federation of Teachers* v. *Randall*, 891 F.2d 1354 (8th Cir. 1989), is equally inapposite. That case also involved the statutorily authorized disbursement of funds to, *inter alia*, religious schools. *Id.* at 1355. The Eighth Circuit has since reaffirmed that a demonstrated nexus to legislative taxing and spending is critical. *Friedmann* v. *Sheldon Cmty. Sch. Dist.*, 995 F.2d 802, 803-804 (8th Cir. 1993). In any event, even if that court's dicta in *Randall*, 891 F.2d at 1358, that taxpayer standing exists "when expenditures are made from general funds" were to be applied in a manner as divorced from the *Flast* criteria as the Seventh Circuit did here, that would simply deepen the inter-circuit conflict that already warrants this Court's review.